IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JASON DOUGLAS BLESSIE,
Petitioner.

No. 2 CA-CR 2013-0550-PR
Filed May 9, 2014

Petition for Review from the Superior Court in Cochise County
No. CR200800172
The Honorable James L. Conlogue, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Jason Douglas Blessie, Kingman
In Propria Persona

MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Petitioner Jason Blessie was convicted after a jury trial of possession of methamphetamine for sale, transportation of methamphetamine for sale, and possession of drug paraphernalia. This court affirmed the convictions and sentences on appeal. *State v. Blessie*, No. 2 CA-CR 2008-0321 (memorandum decision filed Mar. 24, 2010). In his pro se petition for review, he challenges the trial court's denial of relief on claims he raised in his pro se petition for post-conviction relief filed after appointed counsel filed a notice stating she had reviewed the record and had found no colorable claim to raise. We will not disturb the trial court's ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 In his petition for review, Blessie reasserts claims he had raised in his petition for post-conviction relief, including: trial counsel was ineffective in (1) failing to object, move for a mistrial, or seek special action relief on the ground that there was no record of closing argument and, (2) failing to investigate and present evidence that would "establish the unreliability of the drug detection dog," in light of the decision by the Ninth Circuit Court of Appeals in *United States v. Thomas*, 726 F.3d 1086 (9th Cir. 2013), which he seems to argue is a significant change of the law. *See* Ariz. R. Crim. P. 32.1(g). Blessie also contends appellate counsel was ineffective in failing to raise on appeal the absence of a record for closing arguments and prosecutorial misconduct based on the fact that the state maintained there was no informant when there was, in fact, an informant that it failed to disclose. In a related claim he maintains the lack of a record of closing argument affected his ability to raise claims in connection with the informant. Similarly, related to his claim that the

prosecutor had been guilty of misconduct with respect to the informant, he seems to suggest trial and appellate counsel were ineffective and that the lack of disclosure regarding the informant prevented him from raising a third-party culpability defense.

¶3 To establish he was entitled to relief based on the ineffectiveness of trial or appellate counsel, Blessie was required to show counsel's performance fell below prevailing professional standards and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (to establish claim of ineffective assistance of appellate counsel entitling defendant to relief, he must show there is a "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different"). "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a defendant must raise colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996).

¶4 The trial court evaluated the claims underlying the claims of ineffective assistance of trial and appellate counsel and found them to be without merit, thereby implicitly finding that counsel's performance did not prejudice Blessie. The record and the applicable law support the court's resolution of these underlying claims.[1] To the extent Blessie raised these claims independently

[1]We note that the record on appeal was expanded pursuant to appellate counsel's motion to include transcripts of opening statements and closing arguments, thereby belying Blessie's claims with respect to the absence of a record for closing argument. Thus, although the trial court denied relief on this issue for the reason that the presumptive record on appeal does not include transcripts from these portions of a trial unless specially designated and counsel apparently did not designate these portions before the time prescribed by the rule, *see* Ariz. R. Crim. P. 31.8(b)(2)(ii) and (b)(4), because they were ultimately included in the record the court did not err in denying relief on the claims of ineffective assistance of counsel related to this claim. *See State v. Oakley*, 180 Ariz. 34, 36, 881

from his claims of ineffective assistance of trial or appellate counsel, the court correctly found them precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶5 The only potentially non-precluded claim that is independent of the claims of ineffective assistance of counsel, was Blessie's assertion that *Thomas* was a significant change in the law with respect to the reliability of the drug-detection dog. But he did not sustain his burden under Rule 32.1(g). In *Thomas*, 726 F.3d at 1092, the court examined the recent Supreme Court decision, *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 1416-17 (2013), in which the Court held the use of "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" implicated the principles articulated in *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 950 (2012). In *Jones*, the Court had held that a de minimis physical intrusion on the exterior of a car by the use of a GPS-tracking device was a search for purposes of the Fourth Amendment and, therefore, had to be reasonable. ___ U.S. ___, 132 S. Ct. at 949, 954. But even assuming, without deciding, that Blessie raised this claim independently both below and on review, *Thomas* does not represent a change in the law but rather was a fact-specific application of the law regarding the reliability of the drug-detection dog under the facts of that case and the state's disclosure obligation under the circumstances. 726 F.3d at 1092-93. Even if applicable, these authorities would not have affected the result here. The issue of the drug-detection dog's reliability was extensively litigated below in connection with the motion to suppress evidence and that issue was raised on appeal and thoroughly addressed by this court in our memorandum decision. *See Blessie*, No. 2 CA-CR 2008-0321, ¶¶ 5-12.

¶6 Moreover, on review at least, Blessie seems to be intertwining all of his claims with his claims of ineffective assistance of counsel. Blessie has not established the court abused its

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P.2d 366, 368 (App. 1994) ("We will affirm the trial court when it reaches the correct result even though it does so for the wrong reasons.").

discretion in concluding Blessie failed to establish either trial or appellate counsel was ineffective and has failed to raise a colorable claim that either counsel's performance fell below prevailing professional norms. Nor did he sustain his burden of showing how this performance was prejudicial because as we stated, the court correctly found the underlying claims lacking in merit.

¶7 We grant the petition for review but deny relief.